

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE, INC.,

Plaintiff,

v.

ZILLOW, INC., et al.

Defendants.

Case No. 2:21-cv-00312-TSZ

**THE NATIONAL ASSOCIATION OF
REALTORS’® OPPOSITION TO
PLAINTIFF’S MOTION TO COMPEL
30(b)(6) DEPOSITION**

Noted on the Motion Calendar:
November 11, 2022

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT	1
III. CONCLUSION	6
CERTIFICATE OF SERVICE.....	8

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Baleja v. Northrop Grumman Space & Mission Sys. Corp. Salaried Pension Plan,</i> 2020 WL 6586310 (C.D. Cal. June 9, 2020)	1
<i>Blackwell v. City & Cnty. of San Francisco,</i> 2010 WL 2608330 (N.D. Cal. June 25, 2010)	2
<i>Charm Floral v. Wald Imports, Ltd.,</i> 2012 WL 424581 (W.D. Wash. Feb. 9, 2012)	6
<i>Fernandez v. Penske Truck Leasing Co., L.P.,</i> 2013 WL 438669 (D. Nev. Feb. 1, 2013)	5
<i>Groupon, LLC v. Groupon, Inc.,</i> 2012 WL 359699 (N.D. Cal. Feb. 2, 2012)	1, 4
<i>Hosseinzadeh v. Bellevue Park Homeowners Ass'n,</i> 2020 WL 4901674 (W.D. Wash. Aug. 20, 2020)	5
<i>Jones v. United States,</i> 720 F. Supp. 355 (S.D.N.Y. 1989)	6
<i>Paige v. Commissioner,</i> 248 F.R.D. 272 (C.D. Cal. 2008)	6
<i>Peck v. Cty. of Orange,</i> 2020 WL 3026377 (C.D. Cal. May 11, 2020)	1

Other Authorities

Fed. R. Civ. P. 26	1
30	1, 2, 4, 5
W.D. Mo. Loc. Civ. R. 7(d)(2)	6

I. INTRODUCTION

The simple fact is that, as scheduled, NAR did present its person most knowledgeable on the noticed topics (and who also was well prepared), REX did have an opportunity to inquire of NAR's designee on any non-privileged topic, REX did ask its questions, and NAR's designee did provide answers on behalf of NAR. REX does not, and cannot, show otherwise. In fact, REX filed a motion to compel *before* NAR's 30(b)(6) deposition even was scheduled to happen. As such, NAR respectfully requests the Court deny REX's motion to compel (ECF 183).

II. ARGUMENT

While NAR complied with its discovery obligations, REX still proceeded to trouble the Court by demanding that NAR file a motion for a protective order and filing the instant motion to compel—all in an attempt to manufacture a dispute, claim waiver, and depose NAR twice without good cause. As every law student knows, “[u]nless otherwise stipulated or ordered by the court, a deposition is limited to *1 day* of 7 hours.” Fed. R. Civ. P. 30(d)(1) (emphasis added); *see Baleja v. Northrop Grumman Space & Mission Sys. Corp. Salaried Pension Plan*, 2020 WL 6586310, at *3 (C.D. Cal. June 9, 2020) (“The practice in this district has been that the second deposition of a corporate defendant is subject to the one-deposition limitation and requires leave of court before it may go forward.”); *Peck v. Cty. of Orange*, 2020 WL 3026377, at *1 (C.D. Cal. May 11, 2020) (“The law is settled that pursuant to Fed. R. Civ. P. 30(a)(2)(A)(ii), a party may not notice a second 30(b)(6) deposition of an organization without first obtaining leave of court to do so.”); *cf.* Fed. R. Civ. P. 30(a)(2)(A) Advisory Committee Notes (1993) (“A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition.”). Moreover, depositions are limited where “the discovery sought is unreasonably cumulative or duplicative,” “the party seeking discovery has had ample opportunity to obtain the information by discovery in the action,” or “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(6)(2)(c); *see also Groupon, LLC v. Groupon, Inc.*, 2012 WL 359699, at *6 (N.D. Cal. Feb. 2, 2012) (denying leave to take second 30(b)(6) deposition where noticing party voluntarily terminated first 30(b)(6)

deposition); *Blackwell v. City & Cnty. of San Francisco*, 2010 WL 2608330, at *2 (N.D. Cal. June 25, 2010) (denying leave for second 30(b)(6) deposition because “Plaintiff should have been able to cover the subject matters identified in the notice for the second deposition at the time of the first deposition”).

Here, NAR complied with all of its discovery obligations. REX had ample opportunity to depose NAR on Friday, and a second deposition will be both cumulative and unduly burdensome on NAR.

A. NAR Produced a Properly Prepared Rule 30(b)(6) Witness on All of REX’s Topics.

On September 1, 2022, REX noticed a deposition of NAR under Rule 30(b)(6), which had 50 topics and sub-parts. ECF 181 at 4. After meet-and-conferring, REX and NAR agreed that the deposition would be scheduled for October 28. Glass Decl. Ex. 3. On October 10, just 18 days before the deposition was set to proceed, REX served an Amended Rule 30(b)(6) Notice adding 12 new topics and sub-parts. Glass Decl. Ex. 4. NAR timely appeared as agreed on October 28 through its designee Rodney Gansho.

Mr. Gansho is a 31-year veteran of NAR, with extensive knowledge relevant to the topics central to this litigation. *See* Glass Decl. Ex. 1 (Dep. Tr. at 32:15-17; 189:21-190:9). For the past eight years, Mr. Gansho served as the Staff Executive on NAR’s Multiple Listing Issues and Policies Committee and MLS Technology and Emerging Issues Advisory Board. *See* Glass Decl. Ex. 2 (REX Ex. 5). During that time, he has served as one of the main points of contact for communications within NAR about the Model Rules and the issues in this case. *See* Glass Decl. Ex. 2 (REX Ex. 5); Glass Decl. Ex. 1 (Dep. Tr. at 190:4-9). Despite Mr. Gansho being the person most knowledgeable, NAR still spent weeks preparing Mr. Gansho. He spoke with current and former NAR executives, attended multiple preparation meetings with counsel, and reviewed numerous documents in preparation for his deposition. *See* Glass Decl. Ex. 1 (Dep. Tr. at 20:8-21:9).

Specifically, with respect to the topics in dispute, Mr. Gansho met with NAR’s CEO, Bob Goldberg regarding NAR’s relationship with Realtor.com (Topic 12) and his conversations with

1 Errol Samuelson, Zillow's CIO, regarding Zillow's decision to become a member of NAR and join
 2 MLSs (Topic 31). *See, e.g.*, Glass Decl. Ex. 1 (Dep. Tr. at 86:2-87:18; 88:2-18; 149:13-17). Mr.
 3 Gansho also met with the former Director of MLS Engagement, Rene Galicia, regarding
 4 communications between NAR and MLSs on the Model Rules at issue (Topic 32) and
 5 communications or Zillow regarding the Model Rules at issue, its decision to join NAR and/or MLSs
 6 (Topic 31). *See* Glass Decl. Ex. 1 (Dep. Tr. at 189:21-191:11). Mr. Gansho additionally met with
 7 former Associate General Counsel, Cliff Neirsbach, regarding NAR's IDX and VOW Policies as
 8 they pertain to the Model Rules, as well as the adoption of and any modifications to the Model Rules
 9 (Topics 10, 24 and 25). *See* Glass Decl. Ex. 1 (Dep. Tr. at 20:8-25). Further, Mr. Gansho reviewed
 10 over 80 documents in preparation to testify regarding REX's voluminous Topics, and NAR provided
 11 the materials it used to prepare its witness to REX, on each Topic, at the outset of the deposition.
 12 Mr. Gansho testified he was prepared to testify on every topic in the notice, and that there was
 13 nothing more NAR could do to prepare him on those topics. *See* Glass Decl. Ex. 1 (Dep. Tr. at
 14 191:13-198:10).

15 On October 28, Mr. Gansho was present for an entire day and ready to testify on behalf of
 16 NAR for seven hours. And REX deposed him. NAR's counsel only instructed him not to answer
 17 once, and that was based on attorney-client privilege. Otherwise, REX was able to ask all the
 18 questions it wanted. REX even asked Mr. Gansho questions about the topics it claims must be
 19 compelled. For example, Topic 10 seeks information regarding IDX feeds. ECF 182-7, Glass Decl.
 20 Ex. 7. Mr. Gansho testified extensively regarding IDX feeds, Realtor.com, and NAR's IDX policy.
 21 Glass Decl. Ex. 1 (Dep. Tr. at 43:23-57:23; 84:13-159:6) In fact, at the conclusion of the deposition,
 22 Mr. Gansho confirmed he had testified already in response to questioning falling under this Topic.
 23 Glass Decl. Ex. 1 (Dep. Tr. at 193:3-6). Mr. Gansho also offered testimony regarding Topic 12.
 24 Glass Decl. Ex. 1 (Dep. Tr. at 86:9-98:12). Regarding Topics 24-26, which seek information
 25 regarding the Model Rules at issue, Mr. Gansho answered extensive questions regarding the
 26 policies, which, as Mr. Gansho explained, are implemented by the corresponding model rules. Glass
 27 Decl. Ex. 1 (Dep. Tr. at 43:23-84:15, 93:21-94:23, 99:1-170:13). Again, Mr. Gansho confirmed on
 28 the record that he had indeed been asked questions about these Topics. Glass Decl. Ex. 1 (Dep. Tr.

1 at 195:2-196:4). REX also asked Mr. Gansho about Topics 31 and 32, which seek information
 2 regarding “communications by anyone at NAR with anyone at Zillow about Zillow’s decision to
 3 join NAR, to join any MLS, or the Segregation Rule” and “communications by anyone at NAR with
 4 anyone at any MLS regarding application of the Segregation Rule or the Commingling Rule to
 5 Zillow or REX.” Glass Decl. Ex. 1 (Dep. Tr. at 169:10-189:5).

6 Therefore, NAR fully complied with Federal Rule 30(b)(6), and REX had an ample
 7 opportunity to examine NAR on the noticed topics. To the extent REX made a decision not to ask
 8 particular questions, that cannot create good cause for a second deposition. *Cf.* Glass Decl. Ex. 1
 9 (Dep. Tr. at 149:15-20 (“Mr. Gansho: In my preparation, that was one of the issues that Bob
 10 Goldberg told me in his conversation with Errol Samuelson. Mr. Goldfarb: That’s not a topic that I
 11 want to get into today, because that’s one of the ones that we are going to pursue separately.”). REX
 12 cannot manufacture good cause for a second deposition by choosing to avoid certain questions or
 13 topics, or to end the deposition before using all seven hours. *See Groupion*, 2012 WL 359699, at
 14 *6.

15 **B. REX’s Waiver Claims Are Meritless; and NAR Still Provided a Prepared**
 16 **Witness on All of the Topics.**

17 REX’s waiver arguments are irrelevant, as NAR produced a fully prepared witness.

18 Moreover, REX’s waiver arguments are wrong. On September 20, REX and NAR met-and-
 19 conferred for hours, with NAR making objections to REX’s notice. ECF 182 at ¶4. On September
 20 28, NAR objected in writing to REX’s first Rule 30(b)(6) notice with Objections and Responses to
 21 the Rule 30(b)(6) Notice. ECF 182 at ¶5. October 19, NAR objected in writing to REX’s second
 22 Rule 30(b)(6) notice with Supplemental Objections and Responses to the Amended Rule 30(b)(6)
 23 Notice. ECF 182-7. REX did nothing in response to these Supplemental Objections and Responses
 24 to the Amended Rule 30(b)(6) notice until sending its threatening letter on October 23, announcing
 25 that it would proceed to depose NAR on 19 of its topics and sub-parts “as noticed,” that REX was
 26 awarding itself a second deposition as to 43 other topics and sub-parts, suggesting that REX would
 27 seek sanctions if NAR did not comply with REX’s demands, and that NAR “has forfeited its right
 28 to raise objections as a result of its failure to seek a protective order prior to the deposition.” ECF

1 181 at 3. Prior to this letter late on the Sunday night before the deposition, REX had not informed
 2 NAR of these positions. Following receipt of the letter, NAR then attempted to delay the deposition
 3 so that it could seek a protective order and the parties could resolve any remaining disputes before
 4 the deposition, but REX refused, again suggesting it would seek sanctions. ECF 181 at 6. Then, on
 5 October 27, just 4 days after RX's Sunday letter, NAR filed a motion for a protective order. ECF
 6 183. Therefore, NAR did not waive anything.

7 In its motion, REX incorrectly asserts that NAR waived its objections under Rule 37(d)(2).
 8 But that Rule and the cases that REX cites simply stand for the proposition that a party cannot refuse
 9 to appear for a deposition without first obtaining a protective order excusing them from appearance.
 10 NAR did file a motion for a prospective order (which is pending) and, because the Court did not
 11 stay the deposition, NAR did appear. And courts in this district have found motions for protective
 12 orders timely when filed as soon as the night before the scheduled deposition. *Hosseinzadeh v.*
 13 *Bellevue Park Homeowners Ass'n*, 2020 WL 4901674, at *4 (W.D. Wash. Aug. 20, 2020) ("Nothing
 14 in the Federal Rules of Civil Procedure supports Plaintiff's position" that filing a protective order
 15 the night before a deposition was "untimely.").

16 REX does not cite a single case for the remarkable proposition that allows REX to declare
 17 unilaterally, days before a deposition and after months of meet-and-confers, that NAR waived any
 18 objections because the Court did not decide NAR's pending motion for a protective order on REX's
 19 timeline. Nor could it. A responding party preserves objections to a Rule 30(b)(6) Notice by serving
 20 formal objections to that notice, which NAR did three times, twice of which were in writing. *See*
 21 *Fernandez v. Penske Truck Leasing Co., L.P.*, No. 2:12-CV-00295-JCM, 2013 WL 438669, at *2
 22 (D. Nev. Feb. 1, 2013), *objections overruled*, No. 2:12-CV-295 JCM GWF, 2013 WL 2405297 (D.
 23 Nev. May 31, 2013) (finding formal objections to the noticed depositions sufficient to preserve
 24 objections and denying motion to compel even when deponent did not appear).

25 In fact, under the Civil Local Rules, NAR could not have obtained a protective order before
 26 the deposition. REX made its unilateral demand on Sunday, October 23. Under the Civil Local
 27 Rules, a motion for a protective order is a Second Friday Motion. *See* LCR 7(d)(2). Thus, a motion
 28 filed right after REX's letter, which NAR did, would be noted for a week *after* the deposition. Under

1 REX's incorrect position, a noticing party could always force the other party into a waiver, like REX
2 is trying here. A deposition notice is valid if sent in a reasonable amount of time before the noticed
3 date. *See, e.g., Paige v. Commissioner*, 248 F.R.D. 272, 275 (C.D. Cal. 2008) (fourteen days' notice
4 was reasonable); *Charm Floral v. Wald Imports, Ltd.*, 2012 WL 424581, at * 3 (W.D. Wash. Feb.
5 9, 2012) (eight days' notice was reasonable); *Jones v. United States*, 720 F. Supp. 355, 366 (S.D.N.Y.
6 1989) (same). But under Local Rule 7(d)(2), motions for a protective order can be noticed "no
7 earlier than the second Friday after and service of the motion," LR 7(d)(2), which is at most eight
8 days and longer than some reasonable notice. Additionally, under REX's logic, it could notice a for
9 the same day and if the Court did not issue a protective order the responding party would have
10 waived its objections. Therefore, REX's position is both wrong and unreasonable.

11 III. CONCLUSION

12 NAR respectfully requests that the Court deny REX's motion to compel.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: November 4, 2022

2 Respectfully submitted,

3 /s/ Ethan Glass

4 Ethan Glass (*pro hac vice*)
5 Samantha Strauss (*pro hac vice*)
6 **COOLEY LLP**
7 1299 Pennsylvania Avenue, NW
8 Suite 700
9 Washington, DC 20004-2400
10 Telephone: +1 202 776-2244
11 Email: eglass@cooley.com
12 Email: sastrauss@cooley.com

13 Sarah M. Topol (*pro hac vice*)
14 **COOLEY LLP**
15 55 Hudson Yards
16 New York, NY 10001-2157
17 Telephone: +1 212 479-6000
18 Email: stopol@cooley.com

19 Christopher B. Durbin, WSBA No. 41159
20 **COOLEY LLP**
21 1700 Seventh Avenue
22 Suite 1900
23 Seattle, WA 98101-1355
24 Telephone: +1 206 452-8700
25 Email: cdurbin@cooley.com

26 Michael D. Bonanno (*pro hac vice*)
27 **QUINN EMANUEL URQUHART &**
28 **SULLIVAN, LLP**
1300 I Street, Suite 900
Washington, D.C. 20005
Telephone: +1 202 538-8000
Email: mikebonanno@quinnemanuel.com

Thomas C. Rubin, WSBA No. 33829
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, WA 98101
Telephone: +1 206 905-7000
Email: tomrubin@quinnemanuel.com

Attorneys for Defendant
National Association of REALTORS®

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Dated: November 4, 2022.

/s/ Ethan Glass

Ethan Glass
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004-2400
Telephone: +1 202 776-2244
Email: eglass@cooley.com